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IN THE

Supreme Court of the United States

October Term, 1947

No. 374

TACOMA NATIONAL BANK,
PEOPLES TACOMA NATIONAL BANK, and
ARTHUR G. PEDERS, as Receiver of Both Said Banks,
Petitioners,

v.

LOUIS E. SCHAUER and GEORGE DAVIS SCHAUER,
Respondents.

BRIEF FOR PETITIONERS

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IN THE

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OCTOBER TERM, 1937.

No. 374.

TICONIC NATIONAL BANK,
PEOPLES-TICONIC NATIONAL BANK, and
ARTHUR G. PICHER, as Receiver of Both Said Banks,
Petitioners,

v.

LOTTIE F. SPRAGUE and MARGARET DAVIS SPRAGUE,
Respondents.

BRIEF FOR PETITIONERS.

OPINIONS OF THE COURTS BELOW.

The opinion of the United States District Court for the District of Maine appears on Pages 44 to 48 of the record and is reported in 14 F. Supp. 900. The per curiam opinion of the United States Circuit Court of Appeals for the First Circuit affirming the original decree of the District Court but striking out the allowance of interest subsequent to the date of suspension appears on page 57 of the record and is reported in 87 F. (2) 365. The opinion of June 1, 1937,

of the Circuit Court of Appeals upon rehearing appears on pages 52 to 57 of the record and is reported in 90 F. (2) 641.

JURISDICTION.

The decree of the Circuit Court of Appeals to be reviewed was entered on June 1, 1937, (R. 59). Jurisdiction is conferred upon this Court to review this cause by writ of certiorari under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (Title 28, U. S. C. 347). Petition for writ of certiorari was filed on September 1, 1937, and the order allowing the writ of certiorari limited to the question as to the allowance of interest was filed the 18th day of October, 1937. (R. 59).

STATEMENT OF THE CASE.

On July 29, 1935, the respondents, as plaintiffs, filed in the District Court of the United States for the District of Maine, their bill of complaint against the Ticonic National Bank, the Peoples-Ticonic National Bank and Arthur G. Picher, as receiver of both banks. (R. 1). The bill alleges in substance that plaintiffs delivered to the Ticonic National Bank on March 28, 1931, the amount of $5,022.18 under a certain trust agreement. Under the bill the plaintiffs sought to establish a lien on certain securities which had originally been segregated from its other assets by the Ticonic National Bank and held in its trust department to secure the aforesaid fund and other trust funds which the bank received in its trust department and deposited in its own commercial department under the provisions of Section 11(k) of the Federal Reserve Act, (Title 12, U. S. C., 248 (k), Appendix, pp. 25-26). Included among the bonds thus segregated was a certain lot of $20,000 Kingdom of Denmark bonds. (R. 44).

The indenture of trust between Lottie F. Sprague and the Ticonic National Bank empowered the bank to invest and reinvest the fund, but prescribed that as to $1,000.00

thereof, the trustee was authorized and empowered to deposit same in its savings department at its usual and existing rates of interest. (R. 8).

Previous to August 3, 1931, there were two national banks in Waterville, Maine—the Ticonic National Bank and the Peoples National Bank. On that date the Ticonic National Bank sold practically all of its assets to the Peoples National Bank under the provisions of a contract by which the Peoples National Bank undertook and agreed to pay the deposit liabilities of the Ticonic National Bank in full. (R. 36). The Peoples National Bank then changed its name to the Peoples-Ticonic National Bank. The Ticonic National Bank then went into voluntary liquidation under Section 5220 R. S., (Title 12, U. S. C., Sec. 181). (R. 44).

Included in the deposit liabilities assumed by the Peoples National Bank was an account reflecting a balance of $10,127.66. This was the account in which the Ticonic National Bank as fiduciary had carried its trust funds deposited in its commercial department under the permissive provisions of Section 11(k) of the Federal Reserve Act, (Title 12, U. S. C., 248(k)). Included in the total due the several trust estates was an item of $4,882.18, which represented the balance then due on the Lottie F. Sprague trust. Under the provisions of the contract between the two banks the above-mentioned Kingdom of Denmark bonds were sold to the Peoples National Bank. These bonds were then treated by the new bank as its own property and segregated from its other assets to secure its own trust funds deposited by it in its own commercial department. (R. 45).

On March 4, 1933, the Peoples-Ticonic National Bank suspended business and never again reopened. For a while its affairs were administered by a conservator and on November 6, 1933, your petitioner, Arthur G. Picher, was appointed receiver. (R. 3). On March 4, 1933, the date of suspension of the Peoples-Ticonic National Bank, the checking account in the commercial department of that bank,

in which the funds of the Sprague trust as well as of other trust estates of which the Ticonic National Bank was trustee were carried, reflected a balance of $12,462.21 (R. 43) and the amount due on the Lottie F. Sprague trust was $4,099.83. (R. 43). This amount was later reduced by payments made by the Conservator of the Peoples-Ticonic National Bank to $3,649.65, (R. 45), which was the amount due when plaintiffs' bill of complaint was filed.

Between the dates of August 3, 1931, and June 28, 1934, the Ticonic National Bank was in voluntary liquidation. On the latter date your petitioner, Arthur G. Picher, was appointed receiver of that bank also. (R. 3). The Kingdom of Denmark bonds were subsequently sold by the Receiver of the Peoples-Ticonic National Bank for the amount of $20,722.66. (R. 17).

The District Court rendered an opinion on May 29, 1936, (R. 44), holding that respondents were entitled to payment in full of the sum of $3,649.65 with interest from the date the bill was filed and with costs. On June 6, 1936, a final decree was entered by the District Court sustaining the plaintiffs' bill and ordering the defendant, as Receiver of the Peoples-Ticonic National Bank, to pay the plaintiffs the sum of $3,649.65 with interest from July 30, 1935. (R. 48).

Your petitioner appealed to the United States Circuit Court of Appeals for the First Circuit, which court in a per curiam dated January 15, 1937, modified the decree of the District Court by striking out the words, "with interest from July 30, 1935" and as so modified, affirmed the decree of the District Court and entered its final decree to this effect on the same day. (R. 57 & 58).

Thereafter, upon the petition of the respondents and of the petitioner, a rehearing was granted. (R. 58.) On June 1, 1937, the Circuit Court of Appeals rendered an opinion to the effect that respondents were entitled to a lien on the proceeds of the Kingdom of Denmark bonds (which bonds had originally been segregated in the trust department of

the Ticonic National Bank but were later taken over by the Peoples National Bank and sold by the Receiver of the Peoples-Ticonic National Bank) for the amount found due by the District Court. (R. 52.) On the same day the Circuit Court of Appeals entered an order vacating the final decree entered by it on January 15, 1937, and entered a final decree affirming the decree of the District Court, with costs. (R. 58 & 59.)

SPECIFICATION OF ERRORS AS TO WHICH CERTIORARI WAS GRANTED.

It is submitted that the Circuit Court of Appeals for the First Circuit erred:

(1) In holding and deciding that the claimants are entitled to be paid interest out of the proceeds of the Kingdom of Denmark bonds subsequent to March 4, 1933, the date of suspension of the People's Ticonic National Bank;

(2) In holding and deciding that the claimants are entitled to be paid interest out of the proceeds of said securities for a period subsequent to the date of insolvency of the Ticonic National Bank; namely, June 28, 1934.

QUESTIONS PRESENTED.

Is a secured creditor entitled to interest for any period subsequent to the date of suspension of a national bank when it appears that the proceeds of the assets upon which he has a lien are sufficient to pay the principal and said interest but where all of the assets of the bank are insufficient to pay all creditors' claims as of the date of suspension in full?

Is an order of court to pay such interest in conflict with the provisions of Title 12, U. S. C., 194, relating to ratable distribution of the assets of national banks in receivership?

SUMMARY OF ARGUMENT.

The National Bank Act constitutes a complete code for the establishment, operation and winding-up of national banking associations and must be construed uniformly throughout the United States. The provisions of the National Bank Act relating to ratable distribution of the assets of national banks in receivership, as construed by the Courts, require the stoppage of interest on all claims of creditors as of the date of suspension unless and until the amounts of all claims as of that date have been paid in full, whereupon all creditors are alike entitled to share in further ratable distributions to be applied on interest from the date of suspension.

This rule is applicable alike to unsecured and secured creditors. It is applicable even though the claim of a secured creditor is based upon a contract which contains a stipulation for the payment of interest. It is certainly applicable where the contract contains no provision for the payment of interest because in that case if interest were allowed it would be in the nature of damages for a wrongful detention of the fund. This detention, however, is a necessary incident to the operation of the law controlling the liquidation of insolvent national banks and affects all creditors alike. Therefore, the claimants in the instant case are not entitled to interest for any period subsequent to the date of suspension of the Peoples-Ticonic National Bank unless it subsequently developes that sufficient funds are realized from liquidation to pay ratably all creditors interest.

ARGUMENT.

It is recognized at the outset that under ordinary circumstances the holder of a contractual obligation drawing interest is entitled to that interest up to the date of payment as against a solvent debtor and in cases where the solvent debtor has wrongfully withheld the payment of funds, even where there is no specific contract for interest, courts ordinarily will award interest as a measure of damages.

With respect to an insolvent debtor, however, a different rule is necessarily invoked. Since insolvency connotes the inability of the debtor to pay his debts in full as of the date of insolvency, there would be no merit in recognizing the continuing of interest after the date of insolvency or assignment of assets for the benefit of creditors for the purpose of determining the pro rata share of each creditor in the assets of the insolvent debtor. Hence, for the purpose of computing dividends, the general rule is that the amounts due as of the date of insolvency or the assignment of assets for the benefit of all creditors will be used. *Thomas* v. *Western Car Co.*, 149 U. S. 95, 116, 117, 37 L. Ed. 663, 671; *White* v. *Knox*, 111 U. S. 784, 786, 788, 28 L. Ed. 603, 604. It is of course recognized that as against the debtor the claims do not lose their interest-bearing quality and in the event the assets prove sufficient for that purpose interest accruing subsequent to the date of insolvency must be paid. *National Bank of New York* v. *Mechanics National Bank*, 94 U. S. 437, 24 L. Ed. 176; *Richmond* v. *Irons*, 121 U. S. 27, 64, 30 L. Ed. 864, 876; *American Iron & S. Mfg. Co.* v. *Seaboard Air Line Ry.*, 233 U. S. 261, 266, 267, 58 L. Ed. 949, 953, 954.

It is also recognized that in certain cases not involving national banks many courts have allowed interest accrued subsequent to the date of insolvency or the date of the filing of a petition in bankruptcy to be collected by a secured creditor out of his collateral. See *Central Trust Co.* v. *Condon*, 67 Fed. 84; *Coder* v. *Arts*, 213 U. S. 223, 53 L. Ed. 772; *Detroit Trust Co.* v. *State Bank*, 114 N. W. 327; *Hanover National Bank* v. *Brown*, 53 S. W. 206; *Harlan* v. *Houston*, 258 Fed. 611; *San Antonio Loan & Trust Co.* v. *Booth*, 2 F. (2) 590; *State* v. *Chelan Co.*, 54 P. (2) 1006 and *In re Stevens*, 173 Fed. 842.

The above cases are not controlling as to national banks, for national banks, being instrumentalities of the federal government, must be organized, operated and liquidated in compliance with the applicable federal statutes. As was

said in the case of *Cook County National Bank* v. *United States,* 107 U. S. 445, 448; 27 L. Ed. 537, 538:

> "We consider that Act (National Bank Act) as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed; * * * and designating the consequences of their failure to redeem their notes, their liability to be placed in the hands of a receiver, and the manner, in such event, in which their affairs shall be wound up, * * *." (Insert ours.)

Where Congress has seen fit to make statutory provisions embracing an entire subject, dealing with it in all its phases, such as the provisions for the organization, operation and liquidation of national banks, that subject is virtually withdrawn from the operation of a general law as effectively as though, as to such subject, the general law were in terms repealed. *Cook County National Bank* v. *United States, supra.*

The federal statutes authorizing the Comptroller of the Currency to appoint receivers for insolvent national banks and prescribing his duties with respect to the distribution of the assets of said insolvent national banks are found in Sections 192 and 194 of Title 12, U. S. C. (R. S. 5234 & 5236). In the latter section it is prescribed that the Comptroller, after making provision for refunding to the United States any deficiency in redeeming the circulating notes of such association,

> "* * * shall make a ratable dividend of the money so paid over to him by such receiver on *all* such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, * * *." (Italics ours)

The mandatory provision of this statute was considered by this Honorable Court in the case of *White* v. *Knox,* 111 U. S. 784, 28 L. Ed. 603. This case involved a mandamus action to compel the Comptroller of the Currency to pay a dividend

to a creditor of an insolvent national bank on the basis of the amount of a judgment rendered against the bank several years after the date of insolvency. The lower court, in awarding the judgment, had included interest on the amount of the debt as of the date of insolvency up to the date of the entry of the judgment but the Comptroller allowed the claim on a figure representing the amount due as of the date of insolvency, thus eliminating the interest for the period subsequent to insolvency. The action of the Comptroller was supported by this Honorable Court, which said inter alia, at page 787:

> "The business of the bank must stop when insolvency is declared. R. S. Sec. 5228. No new debt can be made after that. The only claims the Comptroller can recognize in the settlement of the affairs of the bank are those which are shown by proof satisfactory to him or by the adjudication of a competent court to have had their origin *in something done before the insolvency.* It is clearly his duty, therefore, in paying dividends, to take the value of the claim at that time as the basis of distribution. If interest is added on one claim after that date before the percentage of dividend is calculated, it should be upon all; otherwise the distribution would be according to different rules and not ratably, as the law requires." (Italics ours)

The rule announced in *White* v. *Knox, supra,* to the effect that the only claims which are entitled to recognition by a receiver of an insolvent national bank are those which had accrued and become unconditionally fixed on or before the suspension of the bank, has been recognized and followed by numerous decisions of this Honorable Court, United States Circuit Courts of Appeals and United States District Courts, as illustrated by the following cases: *Armstrong* v. *American Exchange National Bank,* 133 U. S. 433, 470, 33 L. Ed. 747, 760, 761; *Dakin* v. *Bayly,* 290 U. S. 143, 78 L. Ed. 229; *Scott* v. *Armstrong,* 146 U. S. 499, 36 L. Ed. 1059; *Peoples National Bank* v. *Payne,* 26 F. (2d) 208; *Hallett* v. *Fish,* 123 Fed. 201; *Kershaw* v. *Jenkins,* 71 F. (2) 647;

American National Bank v. *Williams,* 101 Fed. 943; *Citizens Bank & Trust Co.* v. *Thornton et al.,* 174 Fed. 752; *American Surety Co.* v. *De Carle,* 25 F. (2) 18; *Steele* v. *Randall,* 19 F. (2) 40 and *Dunnagan* v. *Best,* 59 F. (2) 795, 796.

The status of secured creditors of insolvent national banks was considered by this Honorable Court in the case of *Merrill* v. *National Bank of Jacksonville,* 173 U. S. 131, 43 L. Ed. 640, and *Aldrich* v. *Chemical National Bank,* 176 U. S. 618, 44 L. Ed. 611. In the case of *Merrill* v. *National Bank of Jacksonville, supra,* at page 146, this Court stated the rule as follows:

> "We repeat that it appears to us that the secured creditor is a creditor to the full amount due him when the insolvency is declared, just as much as the unsecured creditor is, and cannot be subjected to a different rule. And as the basis on which all creditors are to draw dividends is the amount of their claims at the time of the declaration of insolvency, it necessarily results, for the purpose of fixing that basis, that it is immaterial what collateral any particular creditor may have."

And again, at page 147:

> "Our conclusion is that the claims of creditors are to be determined as of the date of the declaration of insolvency, irrespective of the question whether particular creditors have security or not. When secured creditors have received payment in full, their right to dividends, and their right to retain their securities, cease, but collections therefrom are not otherwise material."

Attention is invited to the fact that in that case and in the case of *Aldrich* v. *Chemical National Bank, supra,* the lower courts had awarded interest upon the dividends due the secured creditors from the dates of the declaration of those dividends to the dates on which they were paid to the claimants and the lower court decisions were affirmed by this Honorable Court. But if the claimants were entitled to obtain interest on the principal of the debts up to the dates of payment either out of collateral or general dividends or both,

and these sources were adequate for that purpose, the allowance of interest upon the dividends which were based on the total of principal and interest due as of the date of insolvency would result in a duplication of interest. Thus, the inference can be drawn from said decisions that interest on the principal for any period subsequent to the date of insolveency is not allowable. In fact, this inference apparently was drawn in the case of *Merrill* v. *National Bank of Jacksonville, supra,* by Mr. Justice White in his dissenting opinion, concurred in by Mr. Justice Harlan and Mr. Justice McKenna, wherein he said, at page 172:

> "It seems to me it has been shown by the doctrine announced by Lord Hardwicke in 1743 (Browmley v. Goodere, supra), that the stoppage of interest on the claims of *all* creditors was but an essential evolution of the principle of ratable distribution. This stoppage of interest at the period named is now upheld by the rule sanctioned by this court." (Italics ours)

In several recent decisions Circuit Courts of Appeals have construed the decided cases as establishing the rule that interest on secured claims against an insolvent national bank stops as of the date of suspension. In the case of *Gamble* v. *Wimberly,* 44 F. (2d) 329, decided in 1930, by the Circuit Court of Appeals for the Fourth Circuit, the lower court had allowed a secured creditor to apply collections from collateral security to interest accruing subsequent to the date of suspension of an insolvent national bank in Wilmington, North Carolina, but the Circuit Court of Appeals reversed the lower court, holding that the secured creditor of an insolvent national bank was not entitled to interest accruing subsequent to the date of suspension either out of the proceeds of his collateral or general dividends except that he could apply against said interest accruing subsequent to the date of suspension any interest or dividends accrued and collected upon the collateral itself for the period subsequent to the date of insolvency.

This latter provision, allowing the secured creditor to apply the income from the collateral security accrued subsequent to the date of suspension against interest on the debt for the period subsequent to the date of suspension, was derived from the case of *Sexton* v. *Dreyfus,* 219 U. S. 339, 55 L. Ed. 244, decided by this Honorable Court in 1911. That case, however, involved a secured creditor of a bankrupt estate. It is submitted that there is no logical reason for the application of this rule in bankruptcy to cases involving secured creditors of an insolvent national bank. A secured creditor of a bankrupt estate who wishes to file a claim and participate in general dividends is required to sell his collateral or have it appraised as of the date the petition in bankruptcy was filed, and in the event that the value of the collateral is inadequate to pay the secured creditor in full, he is allowed a claim only for the difference between the proceeds or appraised value of the collateral and the amount due as of the date the petition was filed. Obviously, therefore, such a secured creditor is in the position of becoming virtually the real owner of the securities from the date the petition is filed and it would be illogical and inequitable to require such a creditor to apply the income on those securities for any period subsequent to the date of the filing of the petition to any portion of the claim computed as of the date of filing of said petition. This justification for this phase of the rule in bankruptcy is entirely absent in the case of a secured creditor of an insolvent national bank since a secured creditor against an insolvent national bank is permitted to file his claim for the full amount of the principal and interest due as of the date of insolvency without any application of the proceeds of his collateral or the appraised value thereof and is entitled to ratable dividends on this claim in addition to the proceeds of his collateral, subject only to the limitation that from both sources he cannot obtain any more than the full amount of the debt.

In discussing the case of *Merrill* v. *National Bank of Jacksonville, supra,* the Circuit Court of Appeals in the case

of *Gamble* v. *Wimberly, supra,* arrived at the conclusion that the clear inference to be drawn from that case was that interest for any period subsequent to the date of suspension was not allowable as to secured or unsecured creditors unless and until the principal of the claims of all creditors against the bank as of the date of suspension was paid in full.

Subsequent to the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Gamble* v. *Wimberly, supra,* the following Circuit Courts of Appeals have applied the rule as laid down in *White* v. *Knox, supra,* respecting interest, to cases of secured creditors: *Richman* v. *First M. E. Church of Collingswood,* 76 F. (2) 344, 346 (C. C. A. 3); certiorari denied 296 U. S. 593; *Douglass* v. *Thurston County,* 86 F. (2) 899, 909, 910 (C. C. A. 9); *Fash* v. *First National Bank of Alva,* 89 F. (2) 110, 112 (C. C. A. 10). State courts have likewise applied this rule to secured creditors of insolvent national banks as illustrated by the case of *In re Lemp,* 283 N. Y. Supp. 766, 768.

In the case of *Douglass* v. *Thurston County, supra,* decided in 1936, the treasurer of the county had deposited approximately $60,000 in the insolvent national bank there involved. The funds of the county were secured by certain surety bonds and by collateral pledged by the bank. This collateral was subsequently sold by a Special Master and produced a total in excess of $62,000, thus being adequate to cover principal and some interest. The county asserted a right to recover interest for the period subsequent to the date of suspension, as called for by the contract executed by the bank, and relied upon the previous decision of that same United States Circuit Court of Appeals in the case of *Washington-Alaska Bank* v. *Dexter Horton National Bank,* 263 Fed. 304. The court, however, pointed out that the case relied upon involved an insolvent state bank and the national banking laws dealing with the question of interest after insolvency were, therefore, not involved. The court decided that a secured creditor of an insolvent national bank was

not entitled to interest from any source for any period subsequent to the date of suspension. The court referred to the cases of *Merrill* v. *National Bank of Jacksonville, supra; Chemical National Bank* v. *Armstrong,* 59 Fed. 372; *White* v. *Knox, supra,* etc. and stated on page 909:

> "Whatever may be the state law on the subject, however, it is clear that it is definitely contrary to the federal public policy to permit national banks to contract for interest on deposits held by such banks after insolvency."

It is interesting to note that the decision of the Circuit Court of Appeals for the Ninth Circuit in the *Douglass* v. *Thurston County* case overruled in principle that part of a previous decision of that same court relating to interest namely the case of *First National Bank of Forsyth* v. *Fidelity & Deposit Co. of Maryland,* 48 F. (2d) 585, where the claimant asserted a preferred claim against an insolvent national bank. The court had in that case allowed in part a preferred claim and awarded interest at the legal rate thereon from the date of the decree of the lower court.

In the case of *Fash* v. *First National Bank of Alva, Oklahoma,* 89 F. (2d) 110, decided by the Circuit Court of Appeals for the Tenth Circuit in 1937, the Court decreed that a secured creditor of the insolvent national bank there involved was not entitled to interest for any period subsequent to the date of suspension. The secured deposit balance in that case was approximately $6,200 and the security held by the creditor sold for approximately $8,600. Therefore the collateral was adequate to pay both principal and interest. Nevertheless, in disallowing interest subsequent to suspension, the court said on page 112:

> "It is well settled that interest accruing on a claim after insolvency cannot be paid unless the assets are sufficient to pay all claims in full, because to pay interest on one while others are unpaid in whole or in part would violate the exaction of ratable distribution of assets. White v. Knox, supra; Kershaw v. Jenkins,

supra; Andersen v. Mo. State Life Ins. Co., (C. C. A.) 69 Fed. (2d) 794; Richman v. First Methodist Episcopal Church (C. C. A.) 76 Fed. (2d) 344; Pinckney v. Wylie (C. C. A.), 86 Fed. (2d) 541; American Nat. Bank v. Williams (C. C. A.), 101 Fed. 943. And that rule applies to a claim for a deposit secured by pledged collateral. Interest cannot be paid on such a claim whether it be public money deposited pursuant to the provisions of law, Douglass v. Thurston County (C. C. A.) 86 Fed. (2d) 899; In re American Bank & Trust Co. of Ardmore, 176 Okla. 202, 55 P. (2d) 470; or money of an individual deposited voluntarily, Gamble v. Wimberly (C. C. A.) 44 Fed. (2d) 329."

It is maintained that all persons contracting with a national bank do so in the light of the statutory provisions for winding up the affairs of said bank in the event of insolvency. As was said in the case of *Citizens Bank & Trust Co.* v. *Thornton*, 174 Fed. 752, decided by the Circuit Court of Appeals for the Fifth Circuit in 1909, at page 763:

> "Every creditor who takes a note with provisions like this is charged with knowledge of the law providing for the administration and settlement of the affairs of an insolvent bank that it enters into his contract, and that it does not contemplate that the creditor who litigates the settlement of his claim with the receiver shall be reimbursed out of the trust funds beyond the statutory costs for his expenses in getting his claim allowed and paid."

In that case the note provided that if it was not paid at maturity the debtors would be liable for all costs of collection, including attorney's fees, but the court determined that since these items of expense were incurred subsequent to the date of suspension they could not be paid either out of dividends or the collateral security.

It is recognized that in some cases involving insolvency proceedings but where national banks were not concerned, courts have considered that where a secured creditor had a contract for the payment of interest, the interest was as much a part of the debt as the principal and have thus al-

lowed the secured creditor to obtain interest for a period subsequent to the date of insolvency. But even in equity receivership proceedings, the rule appears to be that in any event interest cannot be considered a part of the debt and protected by the security where there was no contract for the payment of interest. The rule is stated by Ralph E. Clark (author of "Clark on Receivers") in an article in 19 Mich. L. R. 35, entitled "Interest on Claims in Receivership Proceedings", to the effect that if a debtor has contracted to pay interest, a creditor who has a right to hold or appropriate the security or collateral can hold or appropriate it when default occurs of either principal or interest. If the interest is so secured, then the creditor cannot be compelled to relinquish his right thereto until he has been paid both principal and interest up to the date of payment. However, the author states that if the creditor did not contract for the payment of interest he has no such lien covering interest and he cannot obtain from the proceeds of his collateral a sum greater than his original debt without interest. This was the rule followed in the case of *Tredegar Company* v. *Seaboard Air Line Railway et al.*, 183 Fed. 289, decided by the Circuit Court of Appeals for the Fourth Circuit in 1910, and in the cases of *McCormick* v. *Puritan Coal Mining Co.*, 41 F. (2) 213, decided by the Circuit Court of Appeals for the Third Circuit, and *First National Bank of Chicago* v. *Central Coal & Coke Co.*, 3 F. Supp. 433, decided by the District Court of Wyoming.

In the case of *Tredegar Co.* v. *Seaboard Air Line Railway et al., supra,* the property subject to the lien was ample to pay both principal and interest, but the claim was based upon supplies furnished and there was no contract for the payment of interest. The court in that case recognized that when interest is not stipulated for by the contract or required by statute, it is nevertheless allowed by the courts as against a solvent debtor as damages for the detention of money or of property. However when insolvency intervenes a different rule applies, as the court in that case stated on page 292:

"In other words, when a debtor withholds his money or property from his creditor, he injures his creditor by so depriving him of his due, and damages at a fixed rate, ascertained by law to be the value of the use of money, is awarded him for the period his debtor has deprived him of its use. But this presumes that the debtor has the money or property in his possession and is securing the profit arising from its use. On the other hand, when the debtor becomes insolvent and, at the instance of his creditors, his money and property are taken from him by the law, appealed to by creditors for the purpose of ascertaining their rights and priorities to such money and property, it would seem to be unjust to both debtor and to his unsecured creditors to award to secured creditors interest as damages for the law's delays made necessary in the ascertainment and adjustment of the creditors' rights. * * * It, therefore, seems to us to be entirely equitable that, while the custody of the law continues in such case, such interest in the nature of damages should not be awarded."

Of course, the above rule does not apply either in equity receivership cases or insolvent national bank cases where the assets prove sufficient to pay the full amount of the principal and interest due to all creditors as of the date of insolvency with a surplus over. In such cases, all creditors are entitled to interest before the return of any surplus to the debtors. See *American Iron & Steel Co.* v. *Seaboard Air Line R. Co.*, 233 U. S. 261, 266, 58 L. Ed. 949, 953, 954; *National Bank of N. Y.* v. *Mechanics National Bank*, 94 U. S. 437, 24 L. Ed. 176 and *Richmond* v. *Irons*, 121 U. S. 27, 64, 30 L. Ed. 864, 876.

The provisions of the trust indenture in the instant case did not include any stipulation for interest on any portion of the fund except the sum of $1,000, and, therefore, as to all except said fund of $1,000, there is no contract for interest, express or implied. As to the $1,000 item, the indenture provided that the bank should deposit same in a savings account at the usual rate of interest for such accounts. The bank did not, in fact, deposit this $1,000 in a

savings account and the Circuit Court of Appeals pointed that out in concluding that the contention of the petitioner to the effect that only a debtor-creditor relationship had been established with respect to said $1,000 was untenable. The court, therefore, held that the whole fund was in the same category and all of it was secured. In other words, no contract for the payment of interest came into being and the whole fund can, therefore, be treated as not being subject to a contract for the payment of interest.

The case of *Richman* v. *First Methodist Episcopal Church,* 76 F. (2) 344, decided in 1935 by the Circuit Court of Appeals for the Third Circuit (certiorari denied under caption Long v. First Methodist Episcopal Church, 296 U. S. 593, 80 L. Ed. 420), bears some similarity to the instant case. There the First Methodist Episcopal Church had deposited approximately $62,000 with the trust department of a national bank which subsequently became insolvent. Prior to suspension the amount had been reduced by withdrawals to $30,000. The complainant claimed a lien as security for the $30,000 balance, upon $65,000 of municipal bonds or the proceeds thereof which had been segregated by the bank in its trust department for the purpose of securing the funds. The United States District Court for the District of New Jersey decided that the agreement under which the funds were deposited created a bona fide trust and that the balance due was in fact secured by the bonds or the proceeds thereof which had been thus segregated in the trust department under the requirements of 11(k) of the Federal Reserve Act (Title 12, U. S. C. 248(k)). The lower court also awarded interest subsequent to the date of the suspension of the bank. The Circuit Court of Appeals, however, denied the claimant interest accruing subsequent to the date of the appointment of the conservator on March 24, 1933, despite the fact that the collateral security in this case was adequate to pay both principal and interest.

Another case with some similarity to the instant case is that of *In re Lemp,* 283 N. Y. Supp. 766, decided in 1935.

There the insolvent national bank involved was found guilty of maladministration in the handling of a trust estate and a judgment was awarded against the bank by the Supreme Court of New York. The judgment included interest for a period subsequent to the date of suspension of the bank. The case was appealed to the Appellate Division of the Supreme Court of New York and the appellate court modified the decree of the lower court by eliminating the provision for interest for any period subsequent to the date of suspension. Although the reported opinion does not itself reveal the fact that this was a secured claim, it is a fact that there was on deposit with the Superintendent of Banks of the State of New York under the provisions of 39a of the State Banking Act adequate security to pay the principal and interest due on all claims against that bank based upon maladministration of trust estates. Hence this case is significant for the point that in the absence of a contract for the payment of interest the lien is limited to the amount due as of the date of suspension of a national bank.

There are numerous cases involving so-called preferred claims where there is of course no contract for interest, and where the claimants are virtually asserting that property or funds in the possession of the receiver are in fact owned by the claimants. Where such claims have been allowed, interest has been denied because interest in such a case could be based only upon the theory of damages for the wrongful detention of the funds, and since such detention is the necessary effect of the law, rather than the wrongful act of the bank, the other general creditors of the bank whose equity in all of the assets of the bank vested on the date of insolvency cannot have their rights depleted by the allowance of damages for the detention necessarily inflicted as a result of the process of the law in liquidating the insolvent bank. See *Richardson* v. *Louisville Banking Co.*, 94 Fed. 442 (C. C. A. 5) (1899). Other cases adhering to this principle are as follows: *Bell National Bank of Pineville* v. *Green*, 258 Ky. 317, 79 S. W. (2) 967, 971; *Clark*,

Sparks & Sons Mule & Horse Co. v. *Americus National Bank,* 230 Fed. 738, 742; *Butler* v. *Western German Bank,* 159 Fed. 116, 117, 118; *Smith Reduction Corporation* v. *Williams,* 15 F. (2) 874, 875; *Merchants National Bank of Helena* v. *School District,* 94 Fed. 705, 709; *Peoples National Bank* v. *Moore,* 25 F. (2) 599, 601, 602; *Hallett* v. *Fish,* 123 Fed. 201, 202; *Kershaw* v. *Jenkins,* 71 F. (2) 647, 650; *Peoples National Bank et al.* v. *Payne,* 26 F. (2) 208, 209 and *National Bank of America* v. *U. S. Fidelity & Guaranty Co.,* 71 F. (2) 618, 622 (C. C. A. 7).

We are unaware of any case reported or unreported, aside from the case at bar, where the question of interest subsequent to the date of suspension was in issue in which a secured creditor of an insolvent national bank was specifically allowed interest for any period subsequent to the date of suspension except the case of *Gamble* v. *Wimberly, supra,* in which case the secured creditor was permitted to apply against interest accruing subsequent to suspension any interest or dividends accruing and collected on the collateral security for the period subsequent to suspension. As aforementioned, it is believed that this phase of the decision in Gamble v. Wimberly is untenable. (See page 10, *supra*).

It will be noted that the lower courts in the instant case allowed interest at the legal rate from the date of the filing of the bill of complaint in the United States District Court. It is maintained that there is no logical or legal justification for the choice of that date. There is no need for an exhaustive citation of authority to support the proposition that no judicial demand is essential to mature the obligations of an insolvent national bank; that the law will not compel the various creditors to make the futile gesture of making demand. All liabilities of the bank became due and payable upon the suspension of the bank and all must alike await the orderly distribution of the proceeds of the assets by a receiver appointed by the Comptroller of the Currency. *White* v. *Knox,* 111 U. S. 784, 28 L. Ed. 603. See also *Richardson* v. *Louisville Banking Co., supra,* where the Circuit

Court of Appeals reversed the lower court, which had allowed interest on a so-called preferred claim against an insolvent national bank from the date of judicial demand. If, therefore, interest is to be allowed at all it should be allowed from the date of suspension of the Peoples-Ticonic National Bank; namely, March 4, 1933. It is believed that that is the date upon which the rights of the claimant in this case were fixed rather than the date when a receiver was appointed for the Ticonic National Bank; namely, June 28, 1934, because by the decision of the Circuit Court of Appeals in this case the funds which admittedly were on deposit in the Peoples-Ticonic National Bank were held to be secured by the Kingdom of Denmark bonds under the provisions of Title 12, U. S. C., 248(k). That statute merely provides that a national bank shall not use trust funds in the conduct of its business without first securing same by assets segregated in its trust department. Since the funds were on deposit in the Peoples-Ticonic National Bank the decision of the lower courts is equivalent to a determination that the fiduciary limitations imposed by that statute with respect to the securing of said funds as a condition to their use were imposed upon the Peoples-Ticonic National Bank. Therefore the date of the suspension of the Peoples-Ticonic National Bank, namely, March 4, 1933, is controlling in determining the amount due to the claimants in this case and the extent of the lien against said Kingdom of Denmark bonds and the proceeds thereof.

It is believed that in the absence of any contractual obligation to pay interest on this fund the lien upon said Kingdom of Denmark bonds was and is limited to the amount due as of the date of suspension of said Peoples-Ticonic National Bank and any equity in those assets vested immediately in the receiver of the bank for the benefit of all of the creditors of said bank. In other words, the rights *in personam* of the creditors against the bank were converted into rights *in rem* against all of the assets of the bank taken possession of by the receiver, including the

equity then existing in said Kingdom of Denmark bonds. *Chemical National Bank* v. *Armstrong*, 59 Fed. 372.

The instant case differs in certain significant particulars from the ordinary case in which a secured creditor is the pledgee of specific assets to secure the debt due him alone. The assets segregated in the trust department to secure trust funds remain under the dominion and control of the bank and when a receiver is appointed he has the duty of taking possession of those assets in the same manner as with respect to the other assets of the bank and he has the duty of liquidating those assets and distributing the proceeds to all those trust claimants who establish to the satisfaction of the Comptroller of the Currency or by an adjudication of a court of competent jurisdiction that they are entitled to share pro rata in the proceeds of the assets which were thus segregated in the trust department. See the case of *Way* v. *Camden Safe Deposit & Trust Co.*, decided by the United States District Court for the District of New Jersey, and unreported. (Appendix 27.) It is impossible to ascertain with any degree of certainty all of the obligations of the bank which are entitled to the protection of said segregated assets until the status of the various claims have been determined and opportunity has been given for all those whose claims may be in the same category as other trust claimants to establish them. It is, therefore, particularly necessary that the receiver exercise due precaution in recognizing the validity of claims asserted against said segregated assets and it is his duty to reject doubtful claims pending the determination of the rights of the claimants by a court of competent jurisdiction. Hence in such cases the delays are unavoidable and indeed essential to a proper administration of an insolvent national bank and are caused by the necessity of the law governing the equitable distribution of the proceeds of those segregated assets. It would, therefore, be particularly inequitable to penalize the general creditors of the bank by the awarding of damages in

the form of interest to the trust claimants for any period subsequent to the date of suspension of the bank where those damages must of necessity be paid out of the equities owned by all creditors of the bank, which creditors suffer a like or more extended delay in obtaining their respective pro rata shares in the distribution of said assets. As was said in the case of *Richardson* v. *Louisville Banking Co.*, *supra*, at 449:

> "The funds collected, coming into the hands of the Receiver, turned over to the Comptroller could not earn interest, and any interest to be paid thereon would be necessarily taken from some other trust fund. The involved circumstances surrounding the case made it improper, if not impossible for the Receiver to pay over the amount for which he is charged as trustee, without an investigation and an accounting; and we think he was in no fault, but rather in the fulfillment of his official duties, in refusing to recognize complainant's demands until they were judicially determined. As a general rule in equity, trustees are not required to pay interest unless they are in fault in the management of the trust fund or have so used the trust fund as to earn interest."

Summarizing, it is believed that a proper construction of the applicable portions of the National Bank Act requires that the rights of *all* creditors of an insolvent national bank be fixed as of the date of suspension and that no creditor either secured or unsecured can obtain out of the assets of such bank, including pledged assets or assets subject to a lien, anything more than is due him as of the date of suspension unless and until the amounts due all creditors as of that date are paid in full. It is submitted that as of the date of suspension the rights *in personam* of creditors against the national bank became converted into vested rights *in rem* as against all of the assets of the bank, including the equity then existing in pledged securities or property subject to a lien. Therefore, since in the instant case the lien was limited to the amount due the claimants

as represented by the deposit balance in the Peoples-Ticonic National Bank as of the date of suspension there can be no allowance of interest for any period subsequent to that date without encroaching upon the vested rights of the other creditors in the assets of the bank, including the equity in the Kingdom of Denmark bonds here involved.

It is submitted that even though the claim of a secured creditor is based upon a contract which contains a stipulation for the payment of interest no interest is allowable from any source for any period subsequent to the date of suspension of a national bank but there is an additional and controlling reason for the disallowance of interest in this case for any period subsequent to the date of suspension of the Peoples-Ticonic National Bank in that there was no contract for the payment of interest, and if interest were allowed it would necessarily have to be in the form of damages for the detention of the fund, which detention was the result of the operation of the law and affected alike secured and unsecured creditors. It is believed that the allowance of such damages for detention as to one class of creditors at the expense of other creditors would be a violation of the ratable distribution mandate of the National Bank Act.

CONCLUSION.

It is respectfully submitted that the Decree of the United States Circuit Court of Appeals for the First Circuit should be reversed in so far as it provides for the payment of interest to the claimant subsequent to the date of insolvency of the Peoples-Ticonic National Bank.

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Of Counsel.

APPENDIX.

Statutes Involved.

Excerpts from Title 12, U. S. C., 192 (Revised Statutes, Sec. 5234):

> "Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.
>
> "*Provided,* That the comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or national bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safekeeping and prompt payment of the money so deposited".

Title 12, U. S. C., 194 (Revised Statutes, Sec. 5236):

> "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

Excerpts from Title 12, U. S. C., 248(k), (Sec. 11(k) of the Federal Reserve Act):

> "Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account

and shall not be used by the bank in the conduct of business unless it shall first set aside in the trust partment United States bonds or other securities proved by the Federal Reserve Board (Board of G ernors of the Federal Reserve System). (Italics inserts ours)

"In the event of the failure of such bank the own of the funds held in trust for investment shall hav lien on the bonds or other securities so set apart addition to their claim against the estate of the ban

Unreported Case

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY.

IN EQUITY—E-5485.

On Bill for relief, &c. On Motion to strike bill of complaint.

PALMER M. WAY, et als., Trustees of "GG" Mortgage Pool,
Plaintiffs,

vs.

CAMDEN SAFE DEPOSIT & TRUST COMPANY, Substituted Trustees, et al., *Defendants.*

ROBERT K. BELL,
For Defendant Receiver,
BOURGEOIS & COULOMB,
Opposed.

MEMORANDUM.

AVIS, District Judge:

The plaintiffs, as substituted trustees appointed by this Court to take over the execution of a certain trust created by the First National Bank of Ocean City, N. J. (hereinafter called the bank), now insolvent, bring this action for the purpose of discovering the amount of money the trust is entitled to from the securities and funds of the bank placed in its trust department to secure trust funds, used by the bank in its commercial department, and for decrees appointing a trustee or trustees to take over and liquidate

the entire trust fund now in the hands of the receiver of said bank.

The bill sets out the date of insolvency of the bank, the taking over by the Comptroller of the Currency, and the appointment of a receiver; that the bank at the time of insolvency had certain trust funds and property, the administration of which devolved upon the receiver on his appointment; that the plaintiffs were appointed substituted trustees for the GG Mortgage Pool on March 13, 1933; that the bank had collected the amount due on a certain mortgage in this pool in the sum of approximately $70,000, which was not turned over to the substituted trustees.

The bill then sets out sundry other trusts which were controlled by the bank at the time of its insolvency, including private and court trusts and also the mortgage pools; that the bank had set aside certain collateral in its trust department to secure the moneys intrusted to it, and that the plaintiffs and defendants claim to have some interest in these trust securities; that the receiver of the bank turned over to the plaintiffs certain securities and deeds for property, but neglected to pay $72,500, collected on sundry mortgages theretofore placed in the trust by the bank, to the GG Mortgage Pool.

The bill then sets out certain securities in the hands of the bank in its trust department, held as collateral for trust funds, and alleges that the said securities so reported are collateral for the said sum of $72,500 belonging to the GG Mortgage Pool and also for the other trusts enumerated therein.

The bill then alleges that the parties interested in the collateral are unable to agree upon the amount to be allocated to each individual trust, and that the receiver, upon whom the administration of said trust has devolved, is without authority to enter into such agreement.

The prayers are briefly:

(1) That the defendants answer.

(2) That discovery be made as to the claims of all parties interested in the collateral.

(3) That all claimants set forth in detail the basis of their claims.

(4) That this court ascertain and determine the value of securities, and allocate to each claimant his or her proportionate share.

(5) That if the collateral cannot be divided,

(a) A trustee be appointed to sell the collateral and divide the proceeds;

(b) If it is determined the collateral should not be sold, to hold same in care of the trustee until the arival of an appropriate time to sell;

(c) That the trustee be required to enter into bond.

(6) That writs of subpoena issue.

(7) "That plaintiffs have such other and further relief in the premises as shall be agreeable to equity and good conscience."

Sundry defendants have filed answers; others have made no appearance, and E. O. Howell, Jr., receiver of the bank, has moved to strike the bill of complaint on the ground that this Court lacks jurisdiction to entertain the suit.

It will be seen that the effort here is to appoint a trustee in liquidation for all of the securities or funds in the hands of the receiver, which were allocated to the trust department of the bank, and to distribute the fund pro rata to those entitled thereto. The bill does not allege any disagreement between the receiver of the bank and the interested parties, as to the value of trust securities or the amount of any individual claim. It is apparent that the value of the trust securities is not sufficient to satisfy all of the trust claims in full.

Counsel for the receiver relies upon certain Congressional enactments as a justification for his claim that the control and proper distribution of the trust assets is in the hands of the Comptroller of the Currency and the receiver

duly appointed. The powers and duties of a receiver are set forth in 12 U. S. C. A. sec. 192 as follows:

> "Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necesary to pay the debts of such association, enforce the individual liability of the stockholder. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings."

A national bank is authorized to act as trustee, etc., under the provisions of 12 U. S. C. A. sec. 248 (k). Under this authority the bank is required to segregate all assets held in any fiduciary capacity from the general assets of the bank and keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this subsection.

The portion of the above statute having special relevance to the issue in the instant case, reads as follows:

> "Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Board of Governors of the Federal Reserve System.
>
> In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank."
>
> "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money

> so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; * * *."

(12 U. S. C. A. sec. 194.)

The direct question here involved does not seem to have been determined by any court, at least counsel have not cited any decision, and I have been unable to find any. However, all decisions examined tend to the conclusion that, as to the funds of insolvent national banks, the authority of the Comptroller is absolute, and that the courts may not interfere except upon a showing of fraud, mismanagement, lack of good faith, dispute as to right of lien, or controversy as to amount.

The exclusive nature of the control of the Comptroller and receiver is stated in *Earle* v. *Pennsylvania*, 178 U. S. 449.

In *Hulse* v. *Argetsinger* (D. C. W. D. N. Y.) 12 F. (2d) 933 the court, referring to the statute, said on page 935:

> "This provision, it seems to me, plainly gives the Comptroller entire control of the insolvent bank, with the evident purpose of speedily winding up its affairs regardless of the wishes of the stockholders."

In *Liberty Nat. Bank of South Carolina* v. *McIntosh* (CCA 4) 16 F. (2d) 906, syllabus 2 expresses the conclusion of the court in the following language:

> "Jurisdiction of Comptroller of Currency in respect to all matters properly within his discretion relative to liquidation of national banks is exclusive, and his action therein is not subject to review."

In *Anderson* v. *Cronkleton* (CCA 8) 32 F. (2d) 170 the court said on page 171:

> "When a national bank becomes insolvent and is taken over by the Comptroller of the currency and placed in

the hands of a receiver all its assets pass to the control of the receiver."

In *Taylor* v. *Spurway* (CCA 5) 72 F. (2nd) 97 the court took jurisdiction of a suit against a receiver, and granted certain restraints because of a finding of gross fraud.

In the case of *Gimbel* v. *Harriman Nat. Bank & Trust Co. of City of New York* (CCA 2) 83 F. (2d) 153, certiorari denied 299 U. S. 559, the court directed that the plaintiff should have a lien upon certain assets of an insolvent bank deposited to secure trust funds. No suggestion was made in that case tending towards an independent liquidation by substituted trustees, but the court tacitly approved of the liquidation of the trust assets by the receiver.

In *Grindley* v. *First Nat. Bank, Detroit* (CCA 6) 87 F. (2d) 110, the court on page 112 said:

> "Section 191, title 12 U. S. C. (12 U. S. C. A. sec. 191), provides that whenever the Comptroller of the Currency is satisfied that a national bank is insolvent, he may 'after due examination of its affairs— * * * appoint a receiver who shall proceed to close up such association.' By title 12 U. S. C. A. sec. 192, the receiver was required under the direction of the Comptroller, to take possession of the books, records, and assets of every description of the bank and collect all debts, dues and claims belonging to it. He was further required to 'pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller.' The purpose of these statutes is to place the exclusive control of an insolvent national bank in the hands of the Comptroller of the Currency for the liquidation of its assets through a receiver who acts under his direction. Easton v. Iowa, 188 U. S. 220, 231, 23 S. Ct. 288, 47 L. Ed. 452; Cook County Natl. Bank v. United States, 107 U. S. 445, 448, 2 S. Ct. 561, 27 L. Ed. 537; Port Newark Natl. Bank, etc., v. Waldron, 46 F. (2d) 296, 299 (C. C. A. 3); Liberty Natl. Bank v. McIntosh, 16 F. (2d) 906, 909 (C. C. A. 4); Hulse v. Argetsinger, 12 F. (2d) 933, 935 (D. C.)."

Counsel for plaintiffs in their brief cite several cases claimed to sustain plaintiffs' position:

The case of *American Can Co.* v. *Williams* (CCA 2) 153 F. 882 only asserted the right of the court to restrain the receiver from transmitting certain property to the Comptroller until the question at issue in that suit had been determined. This decision was on rehearing.

The original circuit court of appeals case is found in 149 F. 200, and the only question involved was the right of the court to restrain the payment of assets to the Comptroller pending the determination of the validity of a claimed lien.

The ultimate decision of this controversy in the lower court is found in 176 F. 816, and it involved the right to the proceeds of a draft which was collected by the receiver. It has no relevancy to the present controversy.

The case of *Skud* v. *Tillinghast* (CCA 6) 195 F. 1 is general in its nature and inapplicable to the instant case. Of course, the receiver cannot appropriate for the benefit of the creditors any asset that in equity and good conscience belongs to another.

The effort in the instant case is to take over the administration of a general lot of securities, and to make distribution to those entitled, without any suggestion that the liquidation is being improperly carried on by the receiver. The statute leaves the liquidation to the Comptroller and his receiver.

In *Poisson* v. *Williams* (D. C. E. D. N. Car.) 15 F. (2d) 582 the issue was with relation to a designated trust fund, for which an independent trustee had been appointed. This substituted trustee was endeavoring to recover from the receiver not the whole of the bank's trust securities but only that which it was claimed the bank held in trust for the plaintiff in that suit. The funds in the hands of the receiver admittedly were sufficient to pay all claims, and the court there justly directed that the receiver make payment. The principle in that case is not applicable to the present controversy.

The case of *Scott* v. *Armstrong,* 146 U. S. 499, 510 disposed of the question of set-off, and determined that a debtor of the bank had the right to offset any amount he had on deposit against the claim of the receiver.

So far as I can see that case has no bearing upon the instant controversy. The language in the opinion can refer only to the matter there at issue, and the statement that "ratable dividends" are to be made from what belongs to the bank "and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank" relates, as it reads, to the debtor's right to offset what the bank owes him against any claim which the bank has against him.

The case of *Fourth Street Bank* v. *Yardley,* 165 U. S. 634 is not in point. The language quoted in the brief for plaintiffs is academic, and has no bearing upon the right to control and liquidate the trust securities, held by bank at the time of closing as security for moneys held by bank in a fiduciary capacity.

If the bank held an individual trust to secure which certain and definite securities had been pledged, as in the case of the GG Pool, I can see the right to appoint a substituted trustee to handle the assets and take over the pledged securities, but the facts in the instant case are that the securities pledged are the property of the insolvent bank, pledged in toto to secure various accounts.

The right to liquidate and distribute, unless there exists fraud, dispute as to amount, the right of lien, or mismanagement is lodged in the hands of the Comptroller and his receiver. The proper distribution, in case of any dispute or alleged preferences, may be within the court's jurisdiction, otherwise the court cannot interfere.

I feel that counsel for plaintiffs has not differentiated between a specific trust and one general in its nature to secure sundry deposits.

This Court does not have jurisdiction, and the motion to dismiss will be granted.

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DISTRICT COURT OF THE UNITED STATES OF AMERICA

DISTRICT OF NEW JERSEY

I, George T. Cranmer, Clerk of the District Court of e United States of America for the District of New Jer- y, in the Third Circuit, do hereby certify the foregoing be a true copy of the original ORDER DISMISSING LL on file, and now remaining among the records of the id Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my me and affixed the seal of the said Court, at Trenton, in id District, this 12th day of November, nineteen hundred d thirty-seven.

(SIGNED) GEORGE T. CRANMER,
Clerk, District Court, U. S.

By (SIGNED) KATHRYN M. FLYNN,
Deputy.

Seal)